IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1565 OF 2003

Shri Madhukar Nathuram Varghade ...Petitioner
Vs.
Smt Vanita Pandurang Andade ...Respondent

Shri Kiran N. Joshi for the Petitioner.
Shri K.V. Saste, A.P.P. for the Respondent.

CORAM : S.C. DHARMADHIKARI, J.
DATE : DECEMBER 21, 2005.

P.C.:

1. The Petitioner is the original opponent in proceedings under section 125 of the Code of Criminal Procedure, 1973 instituted by the Respondent-Applicant.

2. She filed Misc. Application No.42 of 2002 in the Court of the learned Judicial Magistrate, First Class, Bhiwandi invoking section 125 of the Code of Criminal Procedure, 1973 to claim maintenance for illegitimate child Shailesh. Very brief facts are necessary to appreciate the submission of Shri Joshi appearing in support of this Petition.

3. The case set up in the Application for maintenance is that the Applicant aged 23 years at the relevant time was working as a maid servant in the house of the Petitioner before this Court. She

contended that on several occasions the Petitioner had sexual intercourse with her. This was under the pretext that he will marry her. However, when she was pregnant, the Petitioner refused to marry her. Thereafter, she filed a complaint with police based upon which the Petitioner was charged with offence punishable under section 376 of the Indian Penal Code. In the Sessions Court, at trial, the Petitioner was acquitted of the charge. The Sessions Case number is 468 of 1997.

4. The case of the Applicant is that she gave birth to a son Shailesh on 26th April, 1997. Presently, he is enrolled in school. It is the case of the Respondent that her father is no more and mother is too old. There is nobody in the house to support and maintain the minor son as well as herself. She has no source of income. On the other hand, the Petitioner has business of grocery shop in village Vadavali and his net income is Rs.5,000/- per month from the said shop. Additionally, he owns agricultural land and even that income is to the extent of Rs.12,000/- per year. It is in these circumstances, she claimed maintenance of Rs.1,000/- for her minor son Shailesh.

5. This case was contested by the Petitioner. He denied that he had sexual intercourse with the Respondent at any time and from the said relations the minor Shailesh was born. However, he has admitted that he was prosecuted for offence punishable under section 376 of the Indian Penal Code and his acquittal by the Sessions Court. He denied other contentions in the Application including income from grocery shop and agricultural land. Raising these contentions, he denied his liability to pay maintenance to the minor.

6. The Trial Court, in view of these contentions, framed necessary points. The first point framed for determination was whether the Respondent proves that she gave birth to the minor Shailesh from the relation she had with the Petitioner?

7. I am concerned with the finding rendered on this issue by the courts below. The Trial Court took on record a certified copy of the judgment in Sessions Case No.468 of 1997. The Trial Court also gave opportunity to the parties to lead evidence. The Respondent entered the witness-box and gave particulars of the relationship as well as need for maintenance from the Petitioner. Opponent stepped into box and denied the relationship with the

Respondent. He also denied ownership of grocery shop or agricultural land. He denied that the Respondent was maid servant in his house in the year 1996-97.

8. The Trial Court upon perusal of materials including the judgment rendered by the Sessions Court was pleased to hold that acquittal of the Petitioner from the charge of Rape under Indian Penal Code can be no ground to deny maintenance once relationship is admitted. The Trial Court, therefore, negatived the plea that the Respondent had no relationship of whatsoever nature with the Petitioner and proceeded to consider other materials pertaining to the plea that she is unable to maintain herself. The Trial Court also rendered a finding that the Petitioner has wilfully neglected to maintain the minor Shailesh. The Trial Court proceeded to, therefore, grant maintenance of Rs.500/- per month to the minor Shailesh, from the date of the institution of the Application.

9. The judgment of the Trial Court dated 07th December, 2002 has been affirmed by the learned Additional Sessions Judge, Thane in Criminal Revision Application No.179 of 2002. The Revisional Court has considered the contention whether Application for

maintenance should be granted when there is a denial of relationship.

10. Shri Joshi appearing for the Petitioner invites my attention to the judgment of the Sessions Court in Sessions Case No.468 of 1997 and more particularly, para 9 thereof. In his submission DNA Test is not held. The paternity of the child is therefore, not established. Once paternity of the child is not established then no question of awarding maintenance, on an Application under section 125 of the Code of Criminal Procedure can arise. In other words, paternity of the child not being determined, the question of grant of maintenance under section 125(1)(b) does not arise. He then invites my attention to the order passed by the Trial Court on the maintenance Application and that of the Revisional Court and contends that in the absence of any medical evidence and determination of paternity, even during the course of maintenance proceedings, award of maintenance by the Trial Court and confirmation thereof by the Revisional Court is ex-facie erroneous, illegal and improper. These judgments being wholly perverse, this is a fit case where this Court should interfere and exercise its jurisdiction under Article 227 of the Constitution of India.

11. For appreciating this contention, a reference to section 125 of the Code of Criminal Procedure is necessary. The said section, in so far as, is relevant for the purposes of present proceedings reads thus:

125. Order for maintenance of wives, children and parents.- (1) If any person having sufficient means neglects or refuses to maintain-

(a) .....

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or

12. A bare perusal of this provision would indicate that the legislature contemplates award of maintenance in favour of a legitimate or illegitimate

minor child, whether married or not, unable to maintain itself. The maintenance, which is a monthly allowance is to be paid by a person having sufficient means and neglecting or refusing to maintain such minor child. All that the legislature mandates is evidence of neglect or refusal and there-upon the Magistrate of First Class can order such person to make monthly allowance for the maintenance of such child at such monthly rate as he thinks fit. However, provision of sub section (1) of section 125 of the Code makes it clear that the Magistrate may order the father of the minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

13. In the light of the proviso, it is the submission of Shri Joshi that the legislature contemplates that a person who is ordered to make a monthly allowance for maintenance should be a Father. The word "father" would mean paternity or parenthood. If the legislature contemplates that the person from whom maintenance is claimed on behalf of an illegitimate minor must be a father then paternity needs to be established, if not, already established

in appropriate proceedings which can held to be binding in proceedings under section 125 of the Code. According to him admittedly, paternity is not established in this case.

14. I am unable to accept this contention for obvious reasons. What the legislature contemplates is order for maintenance of wives, children and parents. When the legislature contemplates a person having sufficient means neglecting or refusing, to maintain a legitimate or illegitimate minor then the intention of the legislature cannot be diluted by reading into it, in all cases, necessity of proving paternity by adducing medical evidence. Ultimately, it would be dependent upon facts and circumstances of each case. If the paternity is disputed and the said issue cannot be decided on the touch stone of settled principles of law including earlier adjudication, and other evidence then such an issue depending upon other materials produced, can be decided in proceedings under section 125 of the Code of Criminal Procedure. But there cannot be hard and fast rule that unless and until said issue is decided by holding DNA Test, no finding can be rendered on the obligation to pay maintenance. D.N.A. Test is not a must in each and every case and cannot be ordered as a matter of course.

15. The wider question about necessity and mode of proof of paternity need not be decided in this case, because, admittedly, relations have been admitted. It is not the case of the Petitioner that there were no relations at all between him and the Applicant. On the other hand, all throughout his case is that merely because he had sexual intercourse with the Respondent, it cannot be said that he is guilty of the offence of Rape as contemplated by the Penal Code. The courts in this case have referred to this judgment and the admission of the Petitioner in his reply to the maintenance application that he was prosecuted for an offence punishable under section 376 of the Indian Penal Code. Therefore, relying upon judgment rendered in that case, and the evidence of original Applicant it could be safely said that the Petitioner and the Respondent-Applicant had sexual relations and due to these relations and intercourse the minor child was born and he is an illegitimate minor child within the meaning of the provisions, namely, section 125(1)(b) of the Code of Criminal Procedure. That apart, the very offence with which the Petitioner was charged is under section 375 of the Indian Penal Code, namely, Rape. The said offence contemplates having sexual intercourse with a woman. A man is said to commit

rape, except in a case falling under the six exceptions in section 375 of the Indian Penal Code. Therefore, the very basis of the offence of rape is a man having sexual intercourse with a woman. In the present case, that is an admitted position as is clear from the judgment rendered by the Sessions Court in the criminal case. Once this judgment can be read in evidence in these proceedings, then the courts below committed no error in relying upon the finding therein that the Petitioner had sexual relations with the Respondent and she thereafter gave birth to a son on 26th April, 1997. Once, such judgment with aforesaid finding rendered by competent court is read in evidence in maintenance proceedings then all contentions of the Petitioner including denial of relationship are rightly rejected. That is the right approach in this case.

16. It has also come on record that absence of complete documentary evidence with regard to the income of the Petitioner cannot be a ground to deny maintenance when the Respondent has proved that she is unable to maintain the minor son. It is also clear from the perusal of materials produced that the Petitioner has ignored as well as neglected to maintain the said minor.

17. Considering the very object and purpose of provisions like 125 of the Code which advance a social purpose of avoiding destitution, the courts below were right in holding that the Respondent was entitled to claim maintenance from the Petitioner for the said minor. More particularly, when there is no source of income for his mother and he is a school going child. The relationship is admitted. It is the realtionship which is illegitimate but the relationship between the person from whom maintainence is claimed and the minor is that of father and son. In other words, the person from whom maintenance is claimed is the father of the child. However, in this case, his parents, namely, mother and father are not married to each other. Therefore, their relationship can be said to be not authorised by law. But that is not of any consequence for applicability of Section 125(1)(b) of Code of Criminal Procedure. It is the father’s duty to maintain the child even from such relationship and lookafter its welfare. That responsibility cannot be avoided by the Petitioner. He has taken risk of a sexual intercourse with her resulting in the birth of minor child. He has, therefore, been rightly directed to pay maintenance of Rs.500/- per month.

18. After all the materials referred to above are perused in the light of the relevant statutory provisions, then the orders passed by the courts below cannot be said to be vitiated by any error apparent or can be termed as perverse so as to call for interference in a Petition under Article 227 of the Constitution of India.

19. Petition is summarily dismissed.

JUDGE